should include this requirement in its rules for virtual collocation.

In addition, the Commission now has before it an adequate record under the virtual collocation tariff investigation to order significant modifications to the LEC tariffs originally filed in September 1994. TW Comm and other parties to the investigation have provided detailed analyses of LEC virtual collocation tariffs, and have suggested modifications to these tariffs to comply with the Commission's rules. The Commission should expeditiously conclude its investigation and require the filing of modified virtual collocation tariffs and new physical collocation tariffs.[52]

The Commission should make it crystal clear that ILECs must not impose non-recurring charges which have already been paid on interconnectors that switch from current virtual collocation arrangements to mandatory physical collocation arrangements. Interconnectors that exercise their right to select whether to take physical or virtual collocation or some other form of interconnection such as a meet point arrangement instead of their current arrangement should only be responsible for the reasonable costs incurred by the ILEC in making the change, not the full range

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[52]Expanded Interconnection with Local Telephone Company Facilities, *supra*, 9 FCC Rcd 5154; In the Matter of Local Exchange Carrier's Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, CC Docket No. 94-97, Phase II, *Order Designating Issues for Investigation*, 10 FCC Rcd 11116 (CCB 1995).

of tariffed non-recurring charges which already have been paid for as part of the preexisting arrangement. To the extent that it is the ILEC's decision to move such equipment to a separate caged location, interconnectors should not be held responsible for payment of such rearrangement costs.

5. Unbundled Network Elements

Section 251(c)(3) requires ILECs to provide access to network elements on an unbundled basis. As a facilities-based carrier, TW Comm plans to utilize its own network facilities to provide service to consumers rather than by extensive use of ILEC network elements. However, TW Comm, like virtually all competing LECs, will need to rely to some extent on access to ILEC network elements to provide service, at least at the beginning of its operations. In promulgating regulations to implement the network unbundling requirements, TW Comm shares the Commission's view that the Commission should not attempt to formulate an exhaustive list of network elements. It is more important that rules be implemented expeditiously so that the negotiations between ILECs and interconnectors as well as arbitration proceedings before state commissions may be commenced at the earliest possible time. Recognizing that specific network elements may change over time, TW Comm urges the Commission to adopt an approach to network unbundling which affords negotiating parties maximum flexibility to

identify specific network elements to be made available. For present purposes, it will be sufficient for the Commission to mandate a limited list of unbundled elements consisting of local loops, switching, transport, and database and signaling systems. As with interconnection and collocation, TW Comm believes that the Commission should subject ILECs to reasonable provisioning standards to ensure that access to those network elements will be made available for use by competing carriers in a timely manner.

6. Pricing Of Interconnection, Collocation, And Unbundled Network Elements

As explained at ¶117 of the Notice, the 1996 Act contains pricing standards for interconnection, collocation and unbundled network elements. In each case, the prices are to be just, reasonable and nondiscriminatory. TW Comm agrees with the Commission's tentative conclusion that the Commission has the authority under Section 251(d) -- indeed, the obligation -- to establish nationally uniform rules for the establishment of just, reasonable, and nondiscriminatory prices pursuant to the pricing standards codified in the 1996 Act. TW Comm also agrees that the Commission has the authority to establish rules for determining wholesale rates for purposes of the ILEC resale requirement codified at Section 251(c)(4).

Establishment of nationally uniform rules for determining prices does not mean that prices for interconnection, unbundled

network elements, and collocation will be nationally uniform. Presumably, ILECs will have different costs which will produce differing rates from state to state, even if the rates are based upon the same rules and formulae. If, however, those rates are calculated in the same manner, there should be some consistency, notwithstanding actual cost differences. Further, since the prices for interconnection, unbundled network elements, and collocation will be established without regard to whether use of those services will be for interstate or intrastate purposes, TW Comm agrees with the Commission that there is no need for separating interstate costs from intrastate costs.[53]

Section 252(e)(5) obligates the Commission to preempt states and to assume the responsibilities of state commissions in interconnection matters where the states have failed to fulfill their responsibilities under Section 252. In anticipation of having to exercise this responsibility, the Commission asks whether an absence of federal pricing guidelines would impair its ability to arbitrate or review agreements under Section 252.[54] Hopefully, each state will perform its duties under Section 252 and Commission preemption will not be necessary. Nonetheless, the possibility exists that preemption may become necessary in certain circumstances. Without federal pricing standards, the Commission

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[53]Notice at ¶120.

[54]*Id.*

would have no basis for determining rates if it were forced to preempt under Section 252(e)(5). Unlike situations in which federal courts apply state laws in civil actions based on diversity jurisdiction, there might not be any "state law" (*i.e.*, state-established pricing standards) to apply if a state fails to adopt pricing standards. Thus, in addition to ensuring national uniformity in the establishment of prices for interconnection, network elements, and collocation, establishment by the Commission of federal pricing standards to be applied by the states pursuant to Section 252 would ensure that there are standards available for the Commission to apply in the event that it becomes necessary to preside over a state interconnection arbitration or agreement approval procedure pursuant to Section 252(e)(5).

In the following sections, TW Comm discusses the pricing standards codified in the Act and the Commission's proposals for cost proxy methods. Whatever costing methodologies ultimately are adopted by the Commission, ILECs will continue to have incentives to create price squeezes for competitors. Such pricing behavior can only be prevented by Commission promulgation of an "imputation rule" like that described at ¶184 of the Notice.

a. Establishment Of Rates For Interconnection, Collocation, And Unbundled Network Elements Must Properly Reflect Cost Of Service And Must Not Inhibit Development Of Facilities-Based Competition

The 1996 Act contemplates that local telecommunications service competition will result largely from the development of alternative networks. However, the 1996 Act also recognizes that not all competing providers will rely entirely on their own networks to provide service. TW Comm believes that local service competitors to the ILECs will fall into three broad categories. The first category is facilities-based providers. Those entities, including TW Comm and others, will undertake the investment necessary to construct and operate their own network facilities, including local loops and switches, as well as transmission capacity. Facilities-based providers will look to the ILECs primarily for interconnection of networks, and for reciprocal transport and termination of traffic originated on each other's network. In addition, facilities-based carriers will require access to certain ILEC network elements including essential databases, *e.g.*, 911 and E-911 databases, and certain elements of collocation.

The second category of local competitor is the partial facilities-based carrier, which will provide service through use of a combination of its own facilities supplemented with interconnection and unbundled network elements obtained from ILECs.

In addition, partial facilities-based providers, like the facilities-based providers, will utilize ILEC transport and termination.

The third category of local competitor is the pure reseller. Resellers do not own and operate their own network facilities. Rather, they will provide service by acquiring underlying service from ILECs at wholesale rates and reselling or repackaging those ILEC services to end users. Unlike facilities-based and partially facilities-based carriers, resellers have no need to utilize unbundled network elements, interconnection or collocation.

The pricing of the ILEC services and facilities to be used by each of these categories of competitors is critical to the development of local service markets in which all three categories of providers are afforded fair and equitable opportunities to compete and to introduce innovative services to consumers. How each market entrant chooses to provide service (*i.e.*, whether through its own facilities in whole or in part or through resale in whole or in part) should be based upon each entrant's business plan and its perceptions of market conditions. Those decisions should not be driven by, or even influenced by, pricing advantages or disadvantages created by regulatory decisions. The price standards codified in the 1996 Act are premised upon the need for creation and maintenance of such balance. In short, ILEC pricing of interconnection, network elements, collocation, and wholesale

services should be "competitively neutral" in that it should neither advantage nor disadvantage any category of local competitor.[55]

The pricing standards codified in the Act differentiate between those elements and services available through the ILECs' ubiquitous networks which cannot readily be duplicated by competitors and for which economic alternatives are unavailable, and those elements and services which may economically be duplicated or for which competitive alternatives are available. The service which absolutely cannot be duplicated is the ability of a LEC -- either an ILEC or a competing LEC -- to complete calls originated on another LEC's network. Originating facilities provided by resale or unbundled elements are not essential because they can be built, and consequently, are dependent on a "make-buy" decision of each carrier. Call termination, however, is now, and always will be, an essential element in completing calls because it is the only path available to the called party. This "last bottleneck" should be governed by a lower cost standard than that applicable to facilities subject to the "make-buy" decision. For this reason, the pricing standard for transport and termination set forth at Section 252(d)(2)(A) requires "mutual and reciprocal" cost

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[55]Attachment 2 to these comments is a table entitled "Telecommunications Act of 1996 Interconnection Pricing Standards." That table sets out in graphic form the ILEC services or facilities required by each category of local competitor and the applicable statutory pricing standard for each.

recovery based upon "reasonable approximation of the additional cost of terminating such calls."[56] The generally-accepted economic meaning of "additional" costs is Long Run Incremental Cost ("LRIC"), *i.e.*, the cost of increasing output of a service or network function by a specified incremental amount, holding the production of all other services constant.

Section 252(d)(1) establishes two standards for the pricing of interconnection and unbundled network elements. The first standard is that they shall be "based on the cost (determined without reference to a rate-of-return or other rate base proceeding) of providing an interconnection or network element."[57] This definition excludes historical embedded costs (*i.e.*, rate base costs) and considers the total, forward-looking costs of providing the network elements. The generally-accepted standard for such costs is Total Service Long Run Incremental Cost ("TSLRIC").[58] The second standard codified at Section 252(d)(1) is that prices for ILEC network elements and interconnection "may include a reasonable

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[56]47 U.S.C. §252(d)(2)(A)(ii). Significantly, this requirement does not preclude arrangements that afford mutual recovery of costs through the offsetting of reciprocal obligations (*e.g.*, bill-and-keep). 47 U.S.C. §252(d)(2)(B)(i). The public interest benefits of a system of bill-and-keep for reciprocal termination of traffic are discussed later in these comments.

[57]47 U.S.C. §252(d)(1)(a)(i).

[58]TSLRIC is the firm's total cost of providing all of its services assuming the service in question is offered minus the firm's total cost of producing all of its services excluding the service in question.

profit." What constitutes a "reasonable profit" is a policy issue which Congress, by not defining the term, left to the regulatory agencies charged with implementation of the requirement to determine. Consistent with the underlying policy of Section 252 and the entirety of the 1996 Act, the policy determination as to what constitutes a reasonable profit for network elements and interconnection should depend on the nature of the facilities or services to be provided and the essentiality of those services to the competing telecommunications carrier utilizing those facilities or services.

TW Comm recommends that the Commission adopt a policy which distinguishes between those elements that are available only from the ILEC (*e.g.*, interconnection, collocation, unbundled loops, access to 911 databases, etc.) and those that either can be duplicated by competitors or that are readily available from other sources (*e.g.*, switching, transport, other databases). Facilities and services in the first category should be priced at TSLRIC, with reasonable profit based on the currently-allowed rate of return on the ILEC's capital investment. This formula reflects the bottleneck character and ILEC monopoly control of those facilities.

Facilities and services in the second category (*i.e.*, those with readily available alternatives) would include a reasonable mark-up over TSLRIC, reflecting contribution to shared costs and common overheads. Unbundled loops should be included in the first

category because no entity other than the ILEC is anticipated to offer unbundled loops, nor are any entities (*e.g.*, LECs other than ILECs) obligated under the 1996 Act to offer unbundled loops. If unbundled loops eventually become available from other providers, then that element could be moved to the second category.

Finally, Section 252(d)(3) requires that wholesale prices be based on retail rates, excluding "any marketing, billing and collection, and other costs that will be avoided by the local exchange carrier." TW Comm addresses the avoided cost standard in detail at Section F, following.

In summary, Attachment 3 hereto graphically depicts the cost and pricing standards contained in the 1996 Act. The far left of the scale represents the facilities-based provider, an entity with the ability to provide real choice and innovation, but which requires substantial capital investment and the incurrence of significant risk. By requiring prices at LRIC for call completion, the Act recognizes that such carriers should not also assume the risk of the ILEC, whose facilities constitute an essential bottleneck for the termination of calls destined to customers of the ILEC. At the far right of the scale is the pure reseller, an entity which undertakes no capital investment in local exchange network facilities and which incurs very little risk. The pure reseller enjoys ubiquitous access to customers and basically represents only a change in name to the customer, since its local

services are provided solely over the ILEC's network. Under these circumstances, it is appropriate for the reseller to share the investment risk with the ILEC by paying full retail rates, less only actually avoided costs. In between these extremes are competitors with varying degrees of their own network facilities combined with elements of the ILECs' networks.

b. Proxy-Based Outer Bounds Should Not Be Used To Determine Reasonable Rates Under The Act

Beginning at ¶134, the Notice seeks comment on a series of proposals which would require utilization of proxy factors in lieu of actual cost measurements to determine reasonable rates for interconnection and unbundled elements. While proxy or surrogate factors, once developed, may offer the advantage of expediency and ease of implementation, TW Comm does not believe that proxy-based approaches will result in rate levels which conform with the rate standards contained at Section 252(d) of the Act. At best, proxy factors serve as predictors of what a service provider's costs should be based upon application of certain assumptions -- assumptions which may or may not be valid in any specific circumstance. Proxy factors will not yield rates which are based on cost in every situation.

One specific proxy approach suggested in the Notice is the Benchmark Cost Model jointly submitted by MCI Communications, Inc., NYNEX Corporation, Sprint Corporation, and US West, Inc. in CC

Docket No. 80-286.[59] That model was submitted in that proceeding on the Universal Service Fund in response to a Commission proposal to utilize proxy factors instead of actual loop costs for purposes of establishing ILEC eligibility for high cost assistance. While such proxy models have merit for purposes of identifying high cost geographic areas in connection with universal service funding programs, they have no place in determining ILEC costs under the Section 252(d) pricing standards. Nothing in the 1996 Act or the legislative history suggests that ILEC costs under Section 252(d) are to be based on proxy factors rather than actual costs using costing methodologies designed to accurately measure those costs.

Neither would proxy factors based on existing interconnection arrangements between ILECs and Commercial Mobile Service Providers (CMRS) be appropriate.[60] Significantly, the interconnection arrangements between ILECs and CMRS are not based on the pricing standards codified at Section 252(d). Any correlation between ILEC-CMRS arrangements and ILEC costs under Section 252(d) would be purely coincidental.

The Commission's third proxy proposal, *i.e.*, that network elements should become a subset of the existing access charge elements[61] also should be rejected. There is general recognition

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[59] Notice at ¶137.

[60] Notice at ¶138.

[61] Notice at ¶139.

that the Commission's Part 69 access charge rules, established in 1983, have been rendered obsolete by changes in the telecommunications industry which have occurred since those rules were promulgated, and that the Commission's access charge rules and policies should soon be subject to comprehensive review. Given the fact that there is broad consensus for the view that access pricing reform has become necessary, in part, because of passage of the 1996 Act, TW Comm urges the Commission not to rely on the thirteen-year-old access charge rules to create a surrogate for LEC interconnection and network elements costs under Section 252(d).

c. The Commission's Rules Should Make Clear That The Efficient Component Pricing Rule And Similar Pricing Methodologies Are Not Appropriate For The Pricing Of Services Under Sections 251 And 252

TW Comm agrees with the Commission's tentative conclusion that use of the Efficient Component Pricing Rule ("ECPR") for markets in which competition is developing would be inconsistent with the cost-based pricing standards of Sections 251 and 252. The ECPR holds that the price of any service element furnished by an ILEC to another telecommunications carrier should be equal to the incremental cost of providing the service plus any foregone contribution that the ILEC would suffer as a result of "losing" the customer to the competing telecommunications carrier. In markets which are only partially competitive, this rule is nothing more

than a transparent effort to clothe fundamentally anticompetitive practices in some distorted view of economic theory.

In a competitive market, the profit generated by a sale to any customer generally follows the customer. If the customer buys service from firm B rather than firm A, then firm B receives the revenues and the associated profit. All firms operating in competitive markets have an incentive to maintain prices close to cost in order to remain competitive; hence, any "contribution" that a firm might be able to generate will be primarily attributable to some advantage it enjoys in that market, even if only a temporary advantage. In the case of ILECs, such contribution is not limited by competitive market forces, and can be retained until such time as it becomes subject to sufficient competition so as to no longer possess the ability to exercise market power. When that occurs, the ILEC can shift its pricing so as to derive said contribution from services in which it retains market power, including, *e.g.*, the provision of essential facilities and services required by new entrants. The ECPR thus sanctions continued and permanent exploitation of any pocket of market power that an ILEC retains even after it becomes subject to competition in certain market segments. The ECPR allows -- indeed demands -- that the ILEC shift all "contribution" generated from serving a particular customer or market segment to the noncompetitive interconnection and network elements that are required by new entrants in order to compete with

ILECs. Therefore, the Commission should specify in its rules that ECPR or similar pricing methodologies are not acceptable for the pricing of services under Sections 251 and 252.

d. Interconnection Pricing Rules Should Not Allow Flat Rate Pricing For The Unbundled Switching Element

At ¶153 of the Notice, the Commission asks for comment on a proposal to allow ILECs to implement flat rate pricing structures to purchase switch capacity as an unbundled network element. TW Comm opposes this proposal. First, It appears to TW Comm that the proposal to permit non-traffic sensitive recovery of ILEC switching costs may be premised on an incomplete reading of the definition of "network element" contained in the Act. The Act defines "network element" as follows:

> . . . a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions and capabilities that are provided by means of such facility or equipment . . . .[62]

The switch platform proposal set forth in the Notice seems to be based on the first sentence of the definition of "network element" without due regard for the second. In other words, in establishing network element charges, the charge should not simply be based on the facility or equipment or that portion of the ILEC's facility or equipment, but rather on the cost of providing the feature, function or capability which comprise the network element

[62] 47 U.S.C. §3(29) (emphasis added).

being provided.

Second, pricing switch-based network elements based on a flat-rated portion of the ILEC's switch costs could have the untoward impact of affording non-facilities-based competitors with artificially created cost advantages over those that have chosen to invest in the development of competing networks. Stated simply, under the switch platform proposal, a reseller or other non-facilities-based provider could enjoy all of the benefits of switch ownership without having to incur any of the risk of switch acquisition. A non-facilities-based provider purchasing switching capacity based only on the portion of the ILEC's switch which it will use would receive the benefits of the ILEC's switching economies of scale without bearing any of the risk of underutilized capacity. Such a pricing plan will discourage competitor investment in switches. As stated in ¶99 of the Notice, the primary purpose of switches is to provide dial tone and movement of traffic from line to line, line to trunk, trunk to line, or trunk to trunk. Nothing in the 1996 Act suggests that this capability should not be priced on a per use basis rather than a per line or per partitioned portion of the switch basis. Nor does the 1996 Act suggest that individual features, including, for example, Custom Calling Services or CLASS features, may not be considered to be unbundled network elements.

D. The Interconnection And Unbundled Network Elements Requirements Are Not Applicable To Telecommunications Carriers For Use In The Provision Of Interexchange Services

In the Notice, the Commission requests comment on the application of the Act's ILEC interconnection and unbundled network element requirements to the Commission's access charge rules. Specifically, the Notice asks whether the interconnection and unbundled network elements obligations, including the price standards applicable to those obligations, should be interpreted in a manner which entitles interexchange carriers ("IXCs") to utilize interconnection and unbundled network elements for the origination and termination of interexchange traffic in lieu of interstate access services. Currently, access services are provided by ILECs pursuant to the Commission's access charge rules codified at Part 69 of the Commission's rules and regulations.[63] This issue has engendered several submissions prior to issuance of the Notice. The Commission has tentatively concluded that IXCs are "telecommunications carriers" and therefore, are entitled to interconnect with ILECs, but only for use in their offering of telephone exchange and exchange access services. Under the Commission's interpretation, ILEC network interconnection would not be available for use as an access service for the IXCs' toll

[63] 47 C.F.R. Part 69.

service.[64]

TW Comm agrees with the Commission's conclusion. Several IXC interests have argued that the statutory language could be interpreted to permit interconnection as well as access to unbundled network elements to be available to any telecommunications carrier for any telecommunications service.[65] That interpretation is overbroad and undermines the goals of the 1996 Act, and would effectively negate provisions of the Communications Act. The Part 69 access charge rules promulgated by the Commission in 1983 were adopted pursuant to Section 201(a) of the Communications Act. Nothing in the 1996 Act indicates that any aspect of Section 201 should be displaced. Indeed, Section 251(i) specifically provides that nothing in Section 251 shall be construed to limit or otherwise affect the Commission's authority under Section 201. Clearly, that authority includes the establishment of access charges. Moreover, Section 251(g) provides for continuation of the applicable exchange access requirements, including compensation requirements, following enactment of the 1996 Act which were applicable prior to enactment, until such requirements are superseded by regulations established by the

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[64]Notice at ¶¶160-161.

[65]See, *e.g.*, Interconnection, Unbundling and Access: Creating Full Service Competition Under the Telecommunications Act of 1996, submitted by AT&T, MCI, LDDS WorldCom, and CompTel, to the Office of the General Counsel, March 20, 1996

Commission.

The overall effect of Section 251 is to create an obligation for ILECs to make available to any telecommunications carrier, irrespective of designation (LEC, competitive access provider, IXC, etc.) interconnection and access to unbundled network elements to enable telecommunications carriers to use those facilities and services to provide their own telephone exchange or exchange access services. This interpretation follows from the plain meaning of the statute and is consistent with statements of Congressional intent which indicate that development of local competition is national telecommunications policy. Nothing in the statute or its legislative history indicates any intent by Congress to eliminate on a flash cut basis the Commission's carefully crafted access charge rules or to remove from the Commission the authority under Section 201 of the Act to establish regulations applicable to interstate access services, including the pricing of those services.

Unquestionably, the Commission's access pricing rules are in need of comprehensive change in light of developments which have occurred since their adoption. Enactment of the 1996 Act makes it imperative that the Commission address access pricing soon. As indicated in the Notice, the Commission is committed to undertake access charge reform in the very near future.[66] TW Comm encourages

[66]See Notice at ¶165.

the Commission to act promptly on that commitment. Pending that review, the Commission should resist the overbroad and strained interpretation of the 1996 Act being urged by some which, if accepted, would effectively repeal the Commission's access pricing rules and policies.

E. Interconnection Agreements With "Non-Competing" Neighboring LECs Are Also Subject To Sections 251 And 252

The Commission seeks comment on whether interconnection and traffic termination agreements between "non-competing" neighboring LECs are subject to the requirements of Section 252(c)(2).[67] Clearly, they are. Section 251(c)(2)(A) requires such interconnection for the "transmission and routing of telephone exchange service and exchange access service." The statute makes no distinction between telephone exchange service and exchange access service provided in competition with the ILEC and that which is provided cooperatively with the ILEC (*e.g.*, Extended Area Service arrangements). In addition, it is not always clear whether or not neighboring ILECs are "non-competing." For example, in Atlantic Richfield Company,[68] the Commission issued a declaratory ruling which affirmed the right of a customer of one franchised

[67]Notice at ¶¶170-171.

[68]Atlantic Richfield Company, 59 Rad. Reg 2d 417 (1985), *aff'd.* 3 FCC Rcd 3089 (1988), *aff'd. sub nom.* Public Utility Commission of Texas v. FCC, 886 F.2d 1325 (D.C. Cir. 1989).

ILEC to utilize interstate private microwave facilities to enable it to interconnect its premises with a LEC serving a separate but nearby area. This decision effectively allowed a customer to acquire telephone service from another (*i.e.* a "non-competing") franchised ILEC. Where a LEC provides telephone exchange service to customers in an area served by another LEC, they are competing. Whether or not two LECs are competing has no bearing on their respective statutory obligations under Section 251 to interconnect with each other for the provision of telephone exchange and exchange access service.

On a closely related matter, TW Comm finds troubling recent reports that certain ILECs have attempted unilaterally to abrogate existing interconnection agreements with neighboring LECs rather than submit those agreements to state commissions as required by Section 252(a)(1) of the 1996 Act.[69] Whether or not the provisions of those agreements entered into prior to enactment of the 1996 Act comply with the standards set forth in the 1996 Act is a matter for

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[69] See, *e.g.*, letter from Gary R. Lytle, Vice President, Federal Relations, Ameritech, to the Honorable Reed E. Hundt, Chairman, Federal Communications Commission, dated April 12, 1996, and letter from Richard J. Metzger, General Counsel, Association for Local Telecommunications Services, to Honorable Craig A. Glazer, Chairman, Ohio Public Utilities Commission, dated April 1, 1996 (Mr. Metzger's letter is attached to Mr. Lytle's letter). Indeed, Ameritech contradicts itself in its arguments. On the one hand, it argues that such agreements predate the 1996 Act and therefore are not subject to it; but on the other hand, it uses the 1996 Act's requirements to argue for withdrawal of bill-and-keep arrangements as provided for in those agreements

the state commissions to determine based upon regulations to be established in this proceeding by the Commission. As discussed *infra*, Section 252 clearly requires that all interconnection agreements with ILECs negotiated prior to the 1996 Act must be submitted to state commissions. Neither the Commission nor the state commissions should allow ILECs to evade that requirement by unilaterally terminating those existing agreements rather than subject them to public scrutiny.

F. The Act's Resale Requirements Applicable To ILECs Should Not Be Construed In A Manner As To Require Inefficient Market Entry Through Resale, And To Discourage Investment In Competing Facilities-Based Local Telecommunications Networks

Section 251(b) imposes a general duty on all LECs (including TW Comm and other competing LECs) not to prohibit or to impose unreasonable conditions or limitations on the resale of their telecommunications services. Further, Section 251(c)(4) obligates ILECs to offer for resale at "wholesale rates" any telecommunications service they offer to subscribers who are not telecommunications carriers. Wholesale rates for purposes of the Section 251(c)(4) ILEC resale obligation are to be set "on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs

that will be avoided by the local exchange carrier."[70]

That Congress chose to include two resale obligations in the 1996 Act -- one applicable to all LECs, the other applicable specifically to ILECs, indicates that ILECs -- and only ILECs -- are required to make available for resale to telecommunications carriers at wholesale rates those services provided on a retail basis to consumers who are not telecommunications carriers.

In addressing the scope of the resale requirements, particularly the ILEC obligation to offer services to telecommunications carriers at wholesale rates, TW Comm urges the Commission to focus on the role of resale in the development of competitive local telecommunications services markets. Neither Congress nor the Commission ever has considered resale to be a means for promoting telecommunications competition in any significant manner. Section 271 of the 1996 Act provides for Bell Operating Company ("BOC") provision of in-region interLATA services upon certain circumstances being determined to exist. The first test for BOC in-region interLATA entry is the "presence of a facilities-based competitor."[71] Under that standard, a BOC seeking authority to provide in-region interLATA services must demonstrate that it has entered into an interconnection agreement pursuant to Section 252 with a competing provider which either provides

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[70] 47 U.S.C. §252(d)(3).

[71] 47 U.S.C. §271(c)(1).

telephone exchange service exclusively over its own facilities, or predominantly over its own facilities in combination with the resale of services of another provider. This "presence of a facilities-based competitor" requirement indicates a clear legislative intent that resale-based local service competition is not by itself sufficient competition to warrant removal of the BOC interLATA service prohibition. The legislative history shows that Congress was looking toward the development of alternative local networks to be the primary source of competition for ILECs. As stated in the House Commerce Committee Report:

> . . . the Committee does not intend that the competitor should have to provide a fully redundant facilities-based network to the incumbent telephone company's network, yet it is expected that the facilities necessary for a competitive provider will be present. In this regard, the Committee notes that the cable industry, which is expected to provide meaningful facilities-based competition, has wired 95% of the local residences in the United States, and thus has a network with the potential of offering this sort of competitive alternative. Conversely, resale, as described in Section 242(a)(3), would not qualify because resellers would not have their own facilities in the local exchange over which they would provide service, thus failing the facilities-based test.[72]

Similarly, the Conference Report on the 1996 Act states as follows:

> The conference agreement recognizes that it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant. Some

[72]H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1, at 77 (1995).